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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

December 28, 2021

To:

Hon. Sarah Mae Harless
Circuit Court Judge
Electronic Notice

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Nicholas DeSantis
Electronic Notice

Gary King
Electronic Notice

Branden R. Theroux 372379
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

You are hereby notified that the Court has entered the following opinion and order:

2020AP924

State of Wisconsin v. Branden R. Theroux
(L. C. No. 2015CF837)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Branden Theroux was convicted, following a jury trial, of repeated sexual assault of his girlfriend's nine-year-old daughter, and for showing her a sexually explicit video and a picture of a penis. He appeals, pro se, the denial of postconviction relief and the denial of his motion for reconsideration. He also seeks discretionary reversal in the interest of justice. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).¹

A jury found Theroux guilty of first-degree sexual assault of a child, repeated sexual assault of the same child, and exposing a child to harmful material. After sentencing, Theroux filed a postconviction motion, pointing out that WIS. STAT. § 948.025(3) prohibits the charging of a defendant with repeated sexual assault and a specific sexual assault within the same time period. The State, in its discretion, elected to dismiss the first-degree sexual assault count, and Theroux was resentenced.

Following his resentencing, Theroux filed numerous pro se postconviction motions. Eventually, Theroux filed a pro se WIS. STAT. § 974.06 motion and a “supplement” to that motion, claiming, among other things, that his postconviction counsel was deficient in four ways, all mainly related to the cross-examination of the victim. Theroux subsequently withdrew both his postconviction motion and supplement, explaining that he would file a ***Knight***² petition in this court. Instead, Theroux filed in the circuit court a “motion for a new trial,” wherein Theroux requested a ***Machner***³ hearing to determine whether his postconviction counsel’s alleged ineffectiveness was a sufficient reason to overcome the procedural bars of § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court held that Theroux’s motion was barred by ***Escalona-Naranjo***, and it also denied a subsequent motion for reconsideration.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² *See State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

³ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

On appeal, Theroux argues that his postconviction counsel was ineffective for failing to raise the ineffectiveness of his trial counsel for numerous reasons, including that his trial counsel failed to: (1) investigate facts surrounding the photo of the penis and file a motion in limine to keep the photo from the jury; (2) investigate various expert witnesses; (3) ask for a psychological examination of the victim; (4) call various witnesses at trial; (5) properly impeach the victim and other witnesses; (6) submit proposed jury instructions; and (7) object to the State's closing argument at trial.

Theroux is not entitled to any relief. His current claims could have been raised in his previous postconviction motions, and he is procedurally barred from raising them now. *See* WIS. STAT. § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 185. Theroux fails to appreciate that after his postconviction counsel's alleged deficiency, Theroux himself filed numerous pro se postconviction motions that did not raise any of the claims he now raises. Even if we could somehow assume that ineffective assistance of postconviction counsel could be a sufficient reason for failing to raise his present claims in his first pro se postconviction motion, it is not a sufficient reason for failing to raise them in his numerous subsequent pro se motions.⁴ *See State v. Romero-Georgana*, 2014 WI 83, ¶¶35, 37, 360 Wis. 2d 522, 849 N.W.2d 668.

Theroux also seeks a new trial in the interest of justice. Our statutory authority to grant such a request under WIS. STAT. § 752.35 is to be used sparingly and only in the most exceptional cases. *See State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d

⁴ Because we conclude Theroux's claims are procedurally barred, we need not reach Theroux's argument that his present claims are clearly stronger than the claim his postconviction counsel actually brought.

469. This is not one of the rare exceptional cases warranting reversal. Despite his arguments, Theroux fails to show that the real controversy was not fully tried or that justice miscarried. *See State v. Cameron*, 2016 WI App 54, ¶30, 370 Wis. 2d 661, 885 N.W.2d 611. We therefore reject Theroux's argument for a new trial in the interest of justice.

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals